

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLOTTE COX)	
Claimant)	
VS.)	
)	
RAYTHEON AIRCRAFT CORPORATION)	Docket No. 177, 813
Respondent)	
Self-Insured)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Jon L. Frobish's June 12, 1997, Award. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Garry L. Howard of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Terry J. Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Administrative Law Judge's Award.

ISSUES

The Administrative Law Judge found claimant, on August 7, 1991, had injured her right shoulder in a work-related accident. He awarded claimant a 6 percent permanent partial general disability based on a whole body permanent functional impairment rating. There was no claim for a work disability because claimant remained working on the same job for the respondent at the same wage.

Respondent, however, contends the date of accident is not August 7, 1991, but May 30, 1995, the last day claimant worked before surgery was performed on her right shoulder. Therefore, respondent argues claimant's permanent partial disability benefits are limited to a scheduled injury as set forth in K.S.A. 44-510d(a)(13) of 225 weeks instead of permanent partial disability benefits based on a whole body injury of 415 weeks. Respondent also contends any impairment of function of claimant's right upper extremity should be reduced by the functional impairment that preexisted this injury. Furthermore, respondent contends if the Appeals Board determines that August 7, 1991, is the appropriate date of accident, then this claim is barred by claimant's failure to serve upon respondent a timely written claim for compensation. If the claim is not barred because of an untimely written claim, then respondent contends claimant's benefits are limited to medical treatment because claimant did not miss at least one week from earning full wages as required by K.S.A. 1991 Supp. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds and concludes as follows:

- (1) Claimant started working for the respondent on August 21, 1978. She has been working in her current position as an Inspector A, Final Acceptance, since February 1990.
- (2) The Inspector A job duties are to inspect the entire finished aircraft for air worthiness and quality workmanship.
- (3) Claimant is left-handed, and she is required to use her left upper extremity repetitively noting inspection results on a form contained on a clipboard.
- (4) Claimant's job duties do not require her to constantly use her right upper extremity. However, claimant does have to use both upper extremities when she is inspecting the underneath of an aircraft utilizing a creeper. On occasion, her inspection duties also require her to use her upper extremities for pushing and pulling.
- (5) On August 7, 1991, claimant's right shoulder was hit by a cabin door while claimant was inspecting an aircraft. Claimant was knocked to the floor and had to be carried to respondent's on premises medical department. At that time, claimant completed an

accident form required by the respondent entitled Accident Notice/Employee's Statement of Accident.

(6) Respondent referred claimant for further medical examination and treatment to orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster first saw claimant on September 4, 1991, and diagnosed a soft tissue injury. The doctor placed claimant in a physical therapy program and prescribed anti-inflammatory medication. Claimant remained at work and Dr. Eyster released her without restrictions on December 9, 1991.

(7) Claimant's right shoulder, however, remained symptomatic after Dr. Eyster's treatment, and claimant went on her own for chiropractic treatments in 1992. Claimant, also, on occasion, had to go to respondent's medical department for the discomfort in her right shoulder.

(8) On May 17, 1993, claimant felt a snap in her right shoulder as she was reaching overhead to pull herself up out of a pilot's chair while performing a final inspection of an airplane. Claimant continued to work, and a few days later, while she was on a creeper underneath an airplane performing her inspection duties, she felt another snap in her right shoulder. At that time, claimant reported the incident to respondent's medical department.

(9) Claimant's attorney, at that time, referred her to orthopedic surgeon Michael P. Estivo, D.O. Dr. Estivo saw claimant on June 3, 1993. Dr. Estivo placed claimant in a physical therapy program and prescribed anti-inflammatory medication. The doctor had claimant undergo an MRI examination, nerve conductive study, and an EMG. All of those diagnostic tests were negative. Finally, Dr. Estivo made a clinical diagnosis of right carpal tunnel syndrome.

(10) Dr. Estivo performed a decompression of the median nerve at the right wrist on January 21, 1994. Claimant was off work from January 21, 1994, through February 19, 1994. Dr. Estivo did not attribute the carpal tunnel syndrome to claimant's work, and the right carpal tunnel syndrome is not part of this claim. Claimant was returned to her regular inspection job without work restrictions. Dr. Estivo noted, that following the carpal tunnel release, claimant's right shoulder symptoms improved.

(11) However, after claimant returned to work, her right shoulder became more symptomatic. Dr. Estivo, on June 16, 1994, had claimant undergo a right shoulder arthrogram. At that time, the doctor diagnosed claimant's right shoulder problem as adhesive capsulitis. On November 22, 1994, the doctor manipulated claimant's right shoulder under anesthesia. He also injected the right shoulder following the manipulation process.

(12) Claimant's right shoulder did not improve after manipulation. Dr. Estivo's later diagnoses was impingement syndrome. On May 31, 1995, Dr. Estivo took claimant off work and performed an open acromioplasty of claimant's right shoulder. After surgery,

claimant was again placed in a physical therapy program and prescribed anti-inflammatory medication.

(13) Claimant was released and returned to work without restrictions on July 17, 1995. Claimant's right shoulder remained symptomatic, and Dr. Estivo's medical notes indicate he saw claimant as late as July 2, 1996, with continuing right shoulder pain.

(14) At the March 19, 1997, regular hearing, claimant testified her right shoulder remained symptomatic. Furthermore, claimant testified the symptoms worsened when she worked overhead or when, on occasions, her work required her to overuse her right arm.

(15) Although Dr. Estivo did not realize claimant was left-handed until his deposition testimony, he believed claimant originally injured her right shoulder on August 7, 1991, and her ongoing work activities permanently aggravated the original injury requiring the May 31, 1995, surgery.

(16) Dr. Estivo assessed claimant with an 8 percent permanent impairment of function to the right upper extremity. He believed 50 percent of the permanent functional impairment rating was sustained before the August 7, 1991, accident. Dr. Estivo, however, on cross-examination by claimant's attorney, testified he did not have sufficient medical information to determine what, if any, functional impairment claimant had prior to August of 1991. Dr. Estivo testified his 50 percent impression was speculative and not within a reasonable degree of medical certainty.

(17) Because claimant continued to have pain and discomfort in her right shoulder after surgery, respondent referred claimant for a second opinion to orthopedic surgeon Anthony G. A. Pollock, M.D. Dr. Pollock saw claimant on two occasions, June 18, 1996, and September 12, 1996. He had claimant undergo another nerve conduction study and an EMG test, and again, both of those tests were normal. The doctor placed claimant in a physical therapy program and prescribed a vigorous exercise program.

On May 7, 1997, at the request of respondent's attorney, Dr. Pollock, who had not seen the claimant since September 12, 1996, opined claimant initially injured her right shoulder at work on August 7, 1991, and thereafter her work activities permanently aggravated the right shoulder condition requiring her to have surgery on May 31, 1995. He assessed a 5 percent permanent impairment of function to claimant's right upper extremity and believed 50 percent of that functional impairment rating preexisted the August 7, 1991, accident.

However, on cross-examination by claimant's attorney, Dr. Pollock acknowledged he did not know claimant was left-handed, and further, he did not know claimant had testified that any discomfort and pain she had in the right shoulder before August of 1991, had resolved before the August 7, 1991, accident.

(18) At the request of claimant's attorney, claimant was examined and evaluated by Peter Bieri, M.D., of Lawrence, Kansas. Dr. Bieri saw claimant on one occasion, October 25, 1996, and only for the purpose of determining claimant's permanent functional impairment rating and assessing work restrictions. Dr. Bieri found claimant had suffered an initial injury on August 7, 1991, and a subsequent aggravation on May 17, 1993. As a result of those injuries and the May 31, 1995, surgery, Dr. Bieri believed claimant had a 16 percent permanent impairment of function of the right upper extremity which he converted according to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) to a 10 percent whole body permanent functional impairment rating. The doctor had no opinion on whether claimant had any preexisting permanent impairment before August 1991. The doctor also did not have an opinion on whether claimant's work activities permanently aggravated her right shoulder condition after May 17, 1993. He restricted claimant to the medium category of work.

(19) Admitted into evidence at the regular hearing was a claim for compensation that claimant served on the respondent on June 7, 1993.

Conclusions of Law

(1) A worker is entitled to workers compensation benefits where a preexisting condition is permanently aggravated or accelerated by a work-related accident. See Johnson v. Skelly Oil Co., 181 Kan. 655, 656, 312 P.2d 1076 (1957). The Appeals Board finds claimant initially injured her shoulder at work on August 7, 1991. She then had two aggravating incidents at work in May 1993. Thereafter, claimant received conservative medical treatment for her right shoulder condition and was able to continue to perform her regular work duties. However, those work duties permanently aggravated her right shoulder condition until surgery was required on May 31, 1995.

(2) The date of accident in a repetitive use type of injury is the last day an injured worker has to stop working before surgery. See Durham v. Cessna Aircraft Co., 24 Kan. App.2d 334, 945 P.2d 8 (1997), following the "bright line" rule announced in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

In this case, although claimant did not constantly perform work activities with the right upper extremity, the Appeals Board finds the record supports a date of accident of May 30, 1995, the last day claimant worked before her surgery. Claimant was never taken off of work for her shoulder injury until May 30, 1995. Claimant testified her symptoms worsened when she worked overhead and overused her right arm. Dr. Estivo testified, although claimant only performed overhead work activities two or three times per week, those work activities permanently aggravated her right shoulder because claimant indicated she had pain and discomfort while performing those work activities.

(3) On June 7, 1993, claimant served on respondent a timely written claim for workers compensation benefits as required by K.S.A. 44-520a.

(4) The Appeals Board concludes since May 30, 1995, has been found to be claimant's date of accident, then K.S.A. 44-510d(a)(13) limits claimant's right upper extremity injury to a maximum of 225 weeks of permanent partial disability benefits.

(5) Three physicians testified in this case, and all three expressed opinions on the permanent functional impairment of claimant's right upper extremity. The Appeals Board finds there is no reason to give any more weight to one opinion over another. Therefore, the Appeals Board finds that claimant has a 10 percent permanent functional impairment of the right upper extremity by averaging the 5 percent, 8 percent, and 16 percent ratings of the three testifying physicians.

(6) The Appeals Board finds K.S.A. 44-501(c) which limits an injured worker to only medical compensation if the worker's injuries do not disable the worker from missing one week of earning full wages does not apply in this case. After claimant's right shoulder surgery, she was taken off work and was paid 7 weeks of temporary total disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's June 12, 1997, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Charlotte Cox, and against the respondent, Raytheon Aircraft Corporation, a qualified self-insured, and the Workers Compensation Fund for an accidental injury that occurred on May 30, 1995.

Claimant is entitled to 7 weeks of temporary total disability compensation at the rate of \$319 per week or \$2,233.00, followed by 21.8 weeks of permanent partial disability compensation at the rate of \$319 per week or \$6,954.20 for a 10% permanent partial disability of the right upper extremity at the shoulder level, making a total award of \$9,187.20 which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

The respondent and the Fund have stipulated the Fund shall be responsible for 25% of the award.

All remaining orders of the Special Administrative Law Judge contained in the Award are adopted by the Appeals Board as if specifically set forth in this order.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Wichita, KS
Terry J. Torline, Wichita, KS
E. L. Lee Kinch, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director